STATE OF MICHIGAN

COURT OF APPEALS

VICTOR ANTHONY JOHNSON,

Plaintiff/Counter-Defendant-Appellant,

v

CAROL JOAN JOHNSON,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
May 30, 2006

No. 265181
Oakland Circuit Court
Family Division
LC No. 01-653110-DM

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff/counter-defendant ("plaintiff") appeals as of right the trial court's order regarding his motion for joint custody and petition for the minor children to attend Royal Oak schools.[1] Because the trial court did not abuse its discretion in denying plaintiff's motion for change of custody but did err in failing to conduct an evidentiary hearing with respect to the school issue, we affirm in part, vacate in part, and remand.

The parties were divorced through entry of a consent judgment of divorce on March 18, 2003. The consent judgment vested physical custody of the parties' two minor children with defendant and provided plaintiff with specific parenting time. The consent judgment additionally granted the parties joint legal custody of the children. On March 15, 2004, a consent order for modification of parenting time was entered, increasing plaintiff's parenting time. Relevant to the instant appeal, plaintiff filed a motion on July 27, 2005 seeking joint physical custody of the parties' minor children and, on August 3, 2005, petitioned for the children's attendance at Royal Oak schools. On August 22, 2005, the trial court denied Plaintiff's requests for relief.

MCL 722.28 provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on

[1] This order also addressed plaintiff's motion to appoint another parenting time facilitator and his motion to select the primary care insurance policy for the minor children. Because the instant appeal does not concern these motions, we will not address them in this opinion.

> appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

We review the trial court's discretionary rulings, such as custody decisions, for an abuse of discretion. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). We review questions of law for clear legal error. *Id.* A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.*

On appeal, plaintiff first argues that he is entitled to an evidentiary hearing concerning the best interests of the children because an increase in his parenting time constitutes proper cause or a change in circumstances. We disagree.

MCL 722.27(1)(c) provides that a trial court may only conduct a child custody hearing to modify or amend a previous order or judgment on a showing of proper cause or a change of circumstances. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). The moving party must prove by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court may consider whether an established custodial environment exists and conduct a hearing to review the best interest factors. *Id.*

> To establish proper cause necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well being. *Vodvarka, supra* at 512.

> To show a change in circumstances, plaintiff must show that "the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original). Not just any change will suffice; rather, "the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child." *Id.* at 513-514. This determination will be based on the facts of each case, and the best interest factors should be used for guidance in deciding the relevance of the facts presented.

Plaintiff's parenting time undisputedly increased by 38 overnights (to a total of 169 per year) by virtue of the March 15, 2004 consent order modifying parenting time. Plaintiff, though, provides no law in support of his argument that this constitutes a change in circumstances sufficient to require a hearing on the best interest factors and has demonstrated no effect that the increased parenting time has had on the children's well being. [2] A party may not merely

[2] The proper cause portion of plaintiff's argument was not included in the "statement of questions involved" section of plaintiffs' brief on appeal as required by MCR 7.212(C)(5) and is thus not properly before this Court. Therefore, it is deemed waived and not subject to appellate review. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

announce his position and leave it to the court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton ex rel v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003).

For the same reason, plaintiff's argument that he is at risk of losing the custodial parenting time he has with the minor children if the court continues to deny the custodial status he shares with defendant must fail. Plaintiff does not provide a single citation to the record or any law in support of this argument. Again, this Court will not discover or rationalize the basis for plaintiff's claim when he has failed to do so himself. *Wilson, supra.*

Plaintiff dedicates much of his argument on the custody issue to the fact that the trial court did not examine whether there was an established custodial environment in rendering its decision. As previously indicated, however, plaintiff must demonstrate either proper cause or a change of circumstances *before* the trial court may even consider whether an established custodial environment exists and conduct a hearing to review the best interest factors. *Vodvarka, supra* at 509. Plaintiff has failed to meet this threshold. Moreover, this issue is not properly before this Court because it was not included in the "statement of questions involved" section of plaintiff's brief on appeal as required by MCR 7.212(C)(5). Therefore, it is deemed waived and not subject to appellate review. *Id.*; *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Because plaintiff failed to present any authority suggesting an increase in parenting time presents a material change in circumstances sufficient to warrant a determination of whether an established custodial environment existed, we conclude that the trial court did not abuse its discretion in refusing to conduct an evidentiary hearing on the best interest factors and denying plaintiff's motion for change of custody.

Plaintiff next argues that the trial court erred in denying his motion for the children to attend school in Royal Oak without considering the best interests of the children. We agree.

Pursuant to MCL 722.26a(4), during the time a child resides with a parent, that parent "shall decide all routine matters" concerning the children. See also, *Lombardo v Lombardo*, 202 Mich App 151, 157; 507 NW2d 788 (1993). When the parties share joint legal custody, they share the decision-making authority with respect to the "important decisions affecting the welfare of the child." MCL 722.26a(7)(b); *Lombardo, supra* at 157. When a dispute arises between joint custodial parents concerning important decisions affecting the welfare of the child, such as education, the trial court must determine the best interests of the children. *Id.* at 159-160. "A trial court must consider, evaluate, and determine each of the factors listed" in MCL 722.23 in determining the best interests of the children. *Id.*

At the outset, we note that this issue is not moot because the children continue to attend school and the parties are likely to continue to disagree about this issue. Therefore, the issue will likely continue to affect plaintiff in some collateral way. See *In re Dodge Estate*, 162 Mich App 573, 584-585; 413 NW2d 449 (1987).

Plaintiff and defendant share joint legal custody of the children. The consent judgment of divorce specifically provides, "[t]he parties shall continue to participate in all major decisions concerning the minor children's health, education and welfare. . ." In denying plaintiff's motion

regarding the children's attendance at Royal Oak schools, the trial court noted that defendant had primary physical custody so the children have to go to school near her. There is no evidence that the trial court considered the best interests of the children in denying plaintiff's motion. The trial court did not conduct a hearing on the best interest factors, and the parties did not present any evaluations, depositions, or affidavits addressing the factors. Therefore, we conclude that the trial court committed clear legal error in denying plaintiff's motion without considering the best interest factors and focusing instead on defendant's status as the primary physical custodian. We vacate the portion of the trial court's order denying plaintiff's motion for an order that the children attend Royal Oak schools and remand to the trial court for an evidentiary hearing, where the trial court shall consider, evaluate, and determine each of the factors listed in MCL 722.23. The purpose of this hearing shall be limited to ruling on plaintiff's motion regarding school attendance.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto